

7922

*7922, Pl-1*

**DECISION**



**THE COMPTROLLER GENERAL  
OF THE UNITED STATES**  
WASHINGTON, D.C. 20548

FILE: B-192481

DATE: September 28, 1978

MATTER OF: Peter Rosen Productions, Inc.

**DIGEST:**

1. Determination to set aside procurement under section 8(a) of Small Business Act is matter for contracting agency and SBA, and is not subject to review by GAO in absence of showing of fraud or bad faith on part of Government officials. Protester has failed to establish either fraud or bad faith.
2. Protester has failed to meet burden of proof concerning its allegation of favoritism on part of contracting agency where only evidence in record consists of contradictory statements by protester and contracting agency.
3. It is not GAO practice, pursuant to bid protest function, to conduct investigations for purpose of establishing validity of protester's speculative statements.

Peter Rosen Productions, Inc. (Rosen), protests the decision of the Motion Picture Production Office of the Department of Commerce, National Oceanic and Atmospheric Administration (NOAA), to have recent solicitations for film production set aside for minority businesses pursuant to the Small Business Administration's "8(a)" program. According to Rosen, film production for NOAA is in many cases technical and specialized. Consequently, many "non-minority" firms have become somewhat specialized in areas of underwater, atmospheric, and satellite photography, having made major investments in equipment, personnel, and research. Rosen contends that NOAA's decision to set aside most of its film contracts for "minorities," who in Rosen's opinion may lack technical background and experience, severely limits film contracts for firms such as itself.

Rosen alleges that the decision to let these film production contracts to minority firms is arbitrary since it results from unfair and unstudied action on the part of NOAA. In this regard, Rosen questions whether there may not be a calculated purpose to minimize competition on account of favoritism. Therefore, in addition to protesting any awards made under these solicitations, Rosen requests that this Office investigate their alleged "gross mishandling."

The Department of Commerce states that on June 13, 14 and 15, 1978, its Small Business Minority Specialist reviewed the following three requisitions for motion pictures that it received from NOAA: (1) Requisition No. 03-8-MOI-4245 for a 28-minute, sound, color, 16mm motion picture tentatively titled "The Global Weather Experiment"; (2) Requisition No. 03-8-MOI-4244 for a 28-minute, sound, color, 16mm motion picture tentatively titled "New Investigations Into Aqua-Space;" and, (3) Requisition No. 03-8-MOI-4249 for a 28-minute, sound, color, 16mm motion picture tentatively titled "Climate." The Small Business Minority Specialist determined that two of the requisitions, "New Investigations Into Aqua-Space" and "Climate," were conducive to 8(a) acquisition. The Department of Commerce then contacted the Small Business Administration to have these requirements placed with that agency so that contracts could be entered into with 8(a) firms.

The Department of Commerce states that the above two procurements were set aside for the 8(a) program pursuant to its general policy to screen all requisitions over \$5,000 for goods and services with the intent of matching the Government's needs against the capabilities of firms in the 8(a) program. Commerce further states that the three requisitions were considered independently and that there was no quota or percentage of them that had to be set aside for the 8(a) program. Commerce categorically denies that there was any gross mishandling or favoritism as alleged by Rosen.

Rosen responds to the Department of Commerce's statements by alleging that initially it was determined that all the requisitions would be set-asides. Rosen further alleges that the Department of Commerce neglects to mention that NOAA technical representatives objected

to the set-asides because they did not feel that they would receive acceptable work. Thus, Rosen contends that the advice and recommendations of the NOAA technical and project personnel were intentionally ignored. Rosen argues that the advice of the technical officers should be taken more seriously than the "uninformed" determination of the Small Business Minority Specialist. Finally, Rosen alleges that many other firms have written to NOAA concerning the two 8(a) set-asides, requesting explanations.

In A. R. and S. Enterprises, Inc., B-189832, September 12, 1977, 77-2 CPD 186, we stated that:

"Our Office no longer reviews decisions to set aside procurements under the 8(a) program in view of the broad discretion accorded the SBA under the Small Business Act (15 U.S.C. § 637(a) (1970)) to enter into contracts with procuring agencies for the purpose of letting subcontracts to 8(a) firms. See Automation Information Data Systems, Inc., B-185055, June 15, 1976, 76-1 CPD 377; Jets Services, Inc. B-186066, May 4, 1976, 76-1 CPD 300. Pursuant to that decision, we will not review protests against 8(a) set-asides unless the protester shows fraud on the part of Government officials or such willful disregard of the facts by Government officials as to necessarily imply bad faith. Whether or not the procurement should be set aside under section 8(a) is a matter for the contracting agency and the SBA to decide."

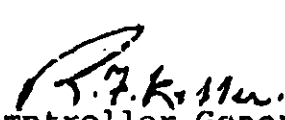
We believe that Rosen has failed to show either fraud or bad faith on the part of the Government procurement officials in connection with the two protested 8(a) set-asides. At most, Rosen has alleged only that some of the firms eligible for award of 8(a) subcontracts for film production are not technically qualified. With regard to Rosen's general allegation of favoritism, where the only evidence before us with

B-192481

respect to this matter consists of contradictory statements by the protester and the contracting agency, the protester has failed to carry the burden of affirmatively proving its assertions. See Telectro-Mek, Inc., B-185992, July 26, 1976, 76-2 CPD 81.

As to Rosen's request for an investigation of alleged mishandling of the protested procurements by the Department of Commerce, it is not the practice of this Office to conduct investigations pursuant to our bid protest function for the purpose of establishing the validity of a protester's speculative statements. Mission Economic Development Association, B-182686, August 2, 1976, 76-2 CPD 105. In the absence of probative evidence, as is the case here, we must assume that a protester's allegations are speculative and conclude that the protester has not met its burden of proof. Dependable Initiator Service and Supply, B-190231, January 3, 1978, 78-1 CPD 1.

Accordingly, Rosen's protest is dismissed in part and denied in part.

  
Acting Comptroller General  
of the United States